Petition

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No.

IN THE

Supreme Court of the United States

October Term, 1981

DALE K. DYKEMA, as Pastor of
Christian Liberty Church, and
CHRISTIAN LIBERTY CORPORATION d/b/a
CHRISTIAN LIBERTY ACADEMY and/or
CHURCH OF CHRISTIAN LIBERTY,

Petitioners

v.

UNITED STATES OF AMERICA and
HENRY GRANER, Exempt Organization
Specialist of the Internal Revenue Service,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dale K. Dykema, as Pastor of Christian Liberty Church, and Christian Liberty Corporation d/b/a Christian Liberty Academy and/or Church of Christian Liberty, the petitioners herein, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned case on December 9, 1981.

QUESTIONS PRESENTED

1. Whether or not the Internal Revenue Service, despite the provisions of Sec. 7605(c), Internal Revenue Code, can subpoena church records without any determination of probable cause and without any belief by the Secretary that the church may be engaged in unrelated trade or business and without the prior notice required by Sec. 7605(c), Internal Revenue Code.

2. If the Internal Revenue Service does, in fact, have subpoena powers over a church without following the provisions of Sec. 7605(c), I.R.C., then is this particular subpoena overbroad and did the Seventh Circuit Court of Appeals err in overturning the finding of the trial court in favor of the Church?

   a. In general, to what extent can the IRS subpoena church records, did the trial court err in the factual determination made in its Findings of Fact and Conclusions of Law in favor of the church, and is the subpoena "overbroad" even if valid *ab initio*?

   b. Does this subpoena, or at least substantial portions of it, violate the First Amendment "freedom of association" rights of the church and its members by seeking a list of contributors to the church, or all correspondence files for the church for 1975 through 1978, names and addresses of persons who have been officers, directors, trustees, or ministers of the church, literature of the church, the names of all associates of the church, a list of church affiliates, documents reflecting sacerdotal functions of the church, documents reflecting the principles, creeds, precepts, doctrines, practices and disciplines espoused by the church, and like documentation?

PARTIES

All of the parties to this proceeding are listed in the caption of the case as set forth on the cover of this Petition.

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OPINIONS BELOW

The Opinion of the Court of Appeals (Seventh Circuit, 1981) herein is reported in 666 F.2d 1096. It is printed in the Appendix hereto. Also printed in the Appendix are the Order of the District Court for the Eastern District of Wisconsin denying the respondents' request for summons enforcement; the Decision of the District Court Judge; and the Findings of Fact, Conclusions of Law, and Recommendation of the Magistrate who heard the matter.

JURISDICTION

The Judgment or decree sought to be reviewed is the Decision of the Seventh Circuit Court of Appeals entered on December 9, 1981. The jurisdiction of the Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The primary United States Constitutional provision involved is the First Amendment to the United States Constitution which is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Also involved are certain sections of the Internal Revenue Code which are set forth in the Appendix. The primary section of the Internal Revenue Code involved is Sec. 7605 (Appendix G-1). Also involved are Internal Revenue Code Sections 7602 (Appendix F-1); 501(c)(3) (Appendix H-1); 508(c) (Appendix I-1 — I-2); and 6033 (Appendix J-1).

STATEMENT OF THE CASE

This case originally arose from a petition filed by the Internal Revenue Service as United States of America and Henry Graner, Exempt Organizations Specialist of the Internal Revenue Service, in the District Court for the Eastern District of Wisconsin, seeking enforcement of a Summons issued by Graner to Dale K. Dykema, as pastor of the Christian Liberty Church, and the Christian Liberty Corporation calling for the production of certain church records. The proceeding was brought by the IRS under the alleged authority for summons enforcement under 26 U.S.C. 7604, also known as Sec. 7604, Internal Revenue Code. The summons called for the production of certain church records (Appendix E). The hearing was had to Magistrate Aaron E. Goodstein in the Eastern District of Wisconsin and he issued his findings of fact, conclusions of law and recommendation on July 31, 1980 (Appendix D). Those findings, conclusions and recommendations were adopted by U.S. District Judge Myron L. Gordon by his Order (Appendix C) and judgment in support of that order (Appendix B). The United States of America and Henry Graner appealed that decision to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C 1291.

Section 7605(c) of the Internal Revenue Code basically provides that no examination of the books of account of a church shall be made to determine whether such church may be engaged in the carrying on of an unrelated trade or business or may otherwise be engaged in activities subject to tax unless the Secretary (such officer being no lower than a principal Internal Revenue officer for an Internal Revenue region) believes that such church may be so engaged and so notifies the church in advance of the examination. Section 7605(c) further generally provides that no examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed. In the instant case, there was no determination that the Secretary believed that the church in question may be "so engaged", and there was no notification of the church in advance of the examination.

On or about August 31, 1979, Dale Dykema, Pastor of the Church of Christian Liberty, received an administrative summons from Henry Graner, a Special Agent with the Internal Revenue Service, requiring that Pastor Dykema appear before Graner on September 21, 1979 to testify and produce comprehensive church documents as set forth in the sweeping 14 paragraph summons. Pastor Dykema did appear on said date but, asserting his First Amendment rights and privileges, did not offer any testimony or documentation. This position is consistent with that stated by Pastor Dykema in the outset of the Internal Revenue Service investigation.

The government maintains that all records sought are necessary, within the meaning of 26 USC 7605(c) to a proper investigation of the church. This position notwithstanding, the Court's attention should be given to the summons itself. Each of the fourteen enumerated requests begins with "All", with but two exceptions. Demand number 7 asks for "one. . . of each" while number 10 demands "documents reflecting any. . .". (Appendix E.)

Pastor Dykema and the church, in an effort to demonstrate a cooperative attitude while maintaining their First Amendment privileges, supplied a number of documents to Special Agent Graner. By letter dated August 16, 1978 the District Director of the Internal Revenue Service was provided the Articles of Incorporation of the Church of Christian Liberty using form that the Church had enjoyed exempt status with the Internal Revenue Service since the date of filing said Articles in March of 1971. Agent Graner testified that he had received documentation reflecting that Pastor Dykema had performed marriages and baptisms. He had also received a number of documents indicating the order of worship of the church and the responsibilities of those who have their children in the educational ministry of the church. He had also received the constitution of the Church of Christian Liberty which enumerated all their operational activities.

Agent Graner testified that he was proffered a copy of the Westminster Confession of Faith, the 400 year old confession adhered to by the Church of Christian Liberty, which he refused to accept.

When the information made available to Agent Graner along with his tour of the facilities, was deemed insufficient by Graner, he sought a court order enforcing compliance with the administrative summons. In response to a show cause order issued by the District Court, a hearing was held before a Magistrate on April 1, 1980. At this hearing, Graner testified that he applies two generalized tests in auditing "[c]haritable organizations, religious organizations, business leagues, social clubs, social welfare organizations." The first one is an organizational document. This is an article of incorporation. Its purpose is dedication of assets." According to Graner's testimony, The Church of Christian Liberty has fully complied with this test.

The second test, called the "operational" test, means that once "you've organized and are operating for some purpose as enumerated ***[in] 501(c)(3), you have to conduct your organization or operation pursuant to the purpose you so selected. And in the religious organization, you have to pursue all activities relevant to that purpose."

> ***A tax exempt audit primarily concentrates on activities, per se, as opposed to finances. In other words, if you are exempt under some code section, you are exempt for certain purposes, and that purpose is only going to be indicated by your activities.

Special Agent Graner testified that he had seen the church in operation, that it was a small facility, that he saw the entire facility, that from all indications it was in fact a church facility, and was involved in no outside business activities that would produce income. He had talked with members of the church board who evidenced instruction in church doctrine and creed, and observed means and instruments of religious instruction, as well as a class engaged in religious instruction. He has viewed a number of documents made available to him and has apparently found no inconsistencies in those documents.

Graner also testified that he had received documents reflecting sacerdotal functions, literature pertaining to school activities and policies, the fact that the church did in fact operate a school in its facilities; he received a copy of contracts for teachers and ministers, a schedule of church officers for the year 1979, and an IBM ledger printout for the year 1979, and that he

had visited the church's facility and witnessed various class sessions. However, Graner testified that this information was insufficient to permit him to make the determination regarding the church's tax-exempt status.

In light of this testimony, the Magistrate concluded that the summons seeking fourteen categories of documents, was overly broad and thus unenforceable. In response to various objections by both parties, the District Court affirmed the Magistrate's conclusion that the summons was overly broad.

The Internal Revenue Service appealed to the Seventh Circuit Court of Appeals which basically reversed the District Court holding that Sec. 7605(c), I.R.C. only relates to the topic of "unrelated business income" and does not restrict the scope of an IRS examination with respect to any other investigation of the church including whether or not the organization is exempt, the type of activities engaged in by the church, whether the church's net earnings inure to the benefit of some private party, whether the church engages in propaganda to influence legislation or it participates in political campaigning. The Seventh Circuit further interpreted Sec. 7605(b) I.R.C. to permit examination of religious activities to determine exempt status. Among other things, the Seventh Circuit Court of Appeals seemed to lay down criteria for what contitutes a church including such criteria as corporate worship services, administration of sacraments, observance of liturgical rituals, a preaching ministry, evangelical outreach, missionary activity, pastoral counseling, performance by clergy of customary church ceremonies such as baptism, etc. and other functions.

ARGUMENTS FOR GRANTING THE WRIT

It appears that the Seventh Circuit Court of Appeals has rendered a decision in conflict with the decisions of other federal courts of appeals on the same matter involving the rights of the IRS to subpoena, without any reason whatsoever, church records. The Seventh Circuit decision is not only in conflict with other appeals courts' decisions but also in conflict with U. S. Supreme Court decisions, especially relating to the "freedom of association" issue. Petitioners feel it is clear under Sec. 7605(c),

I.R.C. that a church's books of account cannot be examined unless the Secretary believes that the organization is engaged in improper activities and notifies the organization in advance of such examination. The results of the Seventh Circuit decision would be to make Sec. 7605(c) meaningless because the Seventh Circuit feels that the IRS can, without any reason whatsoever, examine a church's records for any other purposes related to the Internal Revenue Code. If there is any question about whether or not the IRS needs "probable cause" or a belief in improper activity before being able to examine the church's records, that question should certainly be settled by the U.S. Supreme Court.

I. THE INTERNAL REVENUE SERVICE PURSUANT TO THE PROVISIONS OF SEC. 7605(c), INTERNAL REVENUE CODE, CANNOT SUBPOENA CHURCH RECORDS WITHOUT ANY DETERMINATION OF PROBABLE CAUSE AND WITHOUT ANY BELIEF BY THE SECRETARY THAT THE CHURCH MAY BE ENGAGED IN UNRELATED TRADE OR BUSINESS AND WITHOUT THE PRIOR NOTICE REQUIRED BY SEC. 7605(c), I.R.C.

The "threshold" question should not be whether or not the subpoena was proper or improper, or whether it was overbroad, or whether it was issued for proper purposes. The proper threshold question is whether or not, without a belief by the Secretary of improper activities and advance notice to the church, the subpoena can be issued at all. The Seventh Circuit says that it can; petitioners contend that it cannot. As best counsel for the church can determine, the Court has not decided this issue "head on" before. Those laws defining a church as an "exempt organization" are merely restatements of the U.S. Constitution's First Amendment that "Congress shall make no law respecting an establishment of religion. . .". It would certainly appear to be a fact that churches are "exempt" organizations from taxation because their regular and normal incomes cannot constitutionally be taxed. The only matter Congress can properly inquire into is whether or not a church is in fact a church, because once it is established as a church, it is automatically an exempt organization. Section 508 of the Internal Re-

venue Service Code requires that new Sec. 501(c)(3) organizations notify the IRS upon their formation; except that under 508(c)(1)(a), churches are mandatorily exempted from complying with such notification requirements. Also, under Section 6033, churches are mandatorily exempted from filing annual information returns which are required of other charitable organizations. Therefore, a church is not required to apply for exemption status initially nor to file annual information returns. The logical conclusion is that the exempt status of a church shall not be called into question on the government's initiative without some compelling reason having come to the government's attention. This is clarified in Sec. 7605(c) which lays down the very narrow circumstance in which a church may be examined, after prior notice. There is no authority under the Constitution, the case law, or the Code for the government to arbitrarily and randomly initiate the investigation of a church. This may only be done when the Secretary believes there are improper activities engaged in and has given the church advance notice. Obviously, Sec. 7605(c), I.R.C. is not referring to a subjective or unfounded belief on the part of the Secretary or this section would be entirely meaningless. The provision clearly means that objective belief founded upon some evidence. Further, there would be no requirement for advance notice to the church except to permit the church to seek a hearing at which the Secretary can be compelled to show that his belief is not subjectively, arbitrarily, or capriciously held but that it is founded upon some sort of probable cause that the church may be operating an unrelated business or engaging in an unrelated business.

While the Seventh Circuit seems to recognize the procedural restrictions of 7605(c), I.R.C. and all parties concede that there is no showing in this case that the Secretary held any such belief or gave any such notification, the Seventh Circuit makes an "end run" around Sec. 7605 by saying that it only applies to certain types of examination, but not to other IRS examination. Among these the Court feels are to determine whether or not an organization is engaging in religious activities in order to hold exempt status, or whether its earnings inure to the benefit of an individual or whether it engages in propaganda to influence legislation or participate in political campaigning. Petitioners assert

that even if the Church would (and many do) engage in propaganda to influence political legislation or political votes, it certainly would not take away a church's exempt status. It might affect some other organization's exempt status. Section 7605(c) is preceded by Sec. 7605(b) which is a general restriction applicable to taxpayers other than churches including other tax exempt organizations to the extent that such organizations might be taxable on unrelated business activities. The unique treatment of churches evidences congressional recognition of the government's very limited jurisdiction with respect to churches under the Constitution. The "thunder from the pulpits" in a righteous demand for the passage of repeal of specific legislation is so embedded in our culture and so ingrained as a total fundamental freedom of a church as to be wholly unchallengeable. Would a church lose exempt status if its pastor were to devote four, (or ten, or thirty, or fifty) successive sermons to the view that abortion is a sin? That abortion should be prohibited by specifically proposed legislation? That Candidate A should be voted for because he supports anti-abortion legislation and Candidate B should be voted against because he opposed this legislation. If so, there goes the exempt status of the entire Roman Catholic Church and numerous other regligious bodies.

Strong argument could be made for the fact that churches, since most of these are not organized as corporations are not even intended to be included in the provisions of Sec. 501(c)(1) which seems to refer to corporations. If it were to be construed otherwise, it could be worded to say "corporations, organizations, associations and other bodies of whatever legal form or character, etc." Certainly it cannot mean that churches which opt for the corporate form are exempt whereas those that do not are not exempt.

These are issues which can and should be addressed and decided by the U.S. Supreme Court, in case any doubt remains; and can be brought out more thoroughly in formal briefing once the Petition for Certiorari is granted. To allow the Seventh Circuit decision to stand would be to provide that the IRS is free anytime and anywhere to demand of any church the production of every written document relating to any aspect of church belief or activity, including membership and contributor lists. This is

a monstrous and unprecedented invitation to tyranny which invites blatant and wholly baseless fishing expeditions of the most comprehensive kind violating every notion of religious liberty as well as the most fundamental rights of privacy and association. It lays out a red carpet for the IRS for systematic and mendacious harassment that King George III at his most villainous could only have viewed with envy, and that Adolph Hitler did not achieve until his dictatorship was totally secure. It grants Big Brother an unrestricted license to pry into and profane what are, by very definition, the most sacred of men's beliefs and practices without probable cause or without even an allegation that the government has any lawful interest therein. We feel that such a decision is without precedent in the annals of American Jurisprudence and must be reversed.

Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Gooding v. Wilson*, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103; *NAACP v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328. Any questions or ambiguities regarding the statute will be resolved in favor of adequate protection of First Amendment rights. *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675. The Supreme Court has held that under the "establishment clause", the government may accommodate religion so long as the end result does not excessively entangle government in the affairs of religion, nor result in government surveillance of religious activities. *Meek v. Pittenger*, 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753.

The Summons in this case seeks much information regarding the beliefs of church members including samples of each brochure, pamphlet, handout, program or other literature pertaining to the church and documents reflecting sacerdotal functions and documents reflecting principles, creeds, precepts, doctrines, practices and disciplines espoused by the church, and other like documentation. However, sincerity or nature of religious beliefs cannot be the subject of question. The Court may not question the veracity of a religious belief. *U.S. v. Ballard*, 322 U.S. 78 (1943). The Courts must defer to the church itself in matters of ecclesiastical decisions. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

II. THIS PARTICULAR SUBPOENA IS OVERBROAD AND THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN OVERTURNING THE FINDING OF THE TRIAL COURT IN FAVOR OF THE CHURCH.

A. THE IRS CAN ONLY SUBPOENA CHURCH RECORDS TO A VERY LIMITED EXTENT AND UNDER VERY LIMITED CIRCUMSTANCES AND THE TRIAL COURT DID NOT ERR IN THE FACTUAL DETERMINATION THAT THE SUBPOENA IS OVERBROAD.

The Appellate Court should not have overruled the trial court which heard the facts and made a determination that the subpoena was overly broad and did not comply with the criteria in *U.S. v. Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964). However, we must remember that the "Powell" criteria only comes into play once it has first been established that the IRS has the right to subpoena. Petitioners' primary position is that without a belief by the Secretary and notification to the church, there is no right to subpoena. Only if the Court rejects that argument and determines that the IRS has the right to subpoena and examine without any basis or probable cause whatsoever, need the Court reach the arguments as to the propriety of this particular subpoena in general or under the "freedom of association" cases. In this case the criteria of *U.S. v. Powell, supra*, have not been established in that there has been no establishment that the investigation has a legitimate purpose and that all of the materials requested in the subpoena are relevant to that purpose. Further, obviously, much of the information is already within the government's possession. Further, the steps required by the Internal Revenue Code have not been followed in that the provisions of 7605(c), I.R.C. have not been followed. Even if proper, the subpoena is simply overly broad especially for inquiry into a church's activities. Other Circuits have taken positions contrary to the Seventh Circuit on this issue and, for example, have found that Sec. 7605(c) serves to restrict beyond *Powell*, the scope of Internal Revenue examinations when directed at churches. *U.S. v. Holmes*, 614 F.2d 985 (5 Cir. 1980) involved a summons very similar in content to the case at bar. The Court found that the second prong of the *Powell* standard

(relevancy) was "pruned back" by Congressional introduction of Sec. 7605(c) with its". . . to the extent necessary. . ." language concerning churches. However, to demonstrate the divergence in decisions coming out of the Circuits, it would appear that the First Circuit disagreed in the case of *U.S. v. Freedom Church*, 613 F.2d 316 (1 Cir. 1980) in which a summons similar to the one at bar was enforced. However, it did not appear that the *Freedom* case considered the application of 7605(c) to the scope of Internal Revenue Service examination. The appellee's position in that case was that 7605(c) prohibited altogether the examination of a church's books of account.

Further, the District Court entered a Finding of Fact that the materials called for in the instant summons were not necessary as required by Sec. 7605(c) for the IRS to perform its statutory functions and this Finding of Fact must stand on appeal unless clearly erroneous. Federal Rules of Civil Procedure 52(a); *McAllister v. U.S.*, 348 U.S. 19 (1954); *McCune v. F. Alicot Fish Co.*, 597 F.2d 1252 (9 Cir. 1979); *U.S. v. Oregon State Medical Society*, 343 U.S. 326. 339 (1952).

The IRS may only use summons authority in good faith pursuant to Congressionally authorized purposes of 26 U.S.C. 7602. *U.S. v. LaSalle National Bank*, 437 U.S. 298, 318 (1978).

The Courts have long held that a summons will be deemed unreasonable and unenforceable if it is overbroad; and that the government cannot go on a fishing expedition through a person's books and records. *U.S. v. Theodore*, 479 F.2d 749 (1973); *U.S. v. Dauphin Trust Co.*, 385 F.2d 129 (3 Cir. 1967).

The case of *U.S. v. Life Science Church of America*, 636 F.2d 221 (8 Cir. 1980) quoted the *Holmes, supra*, decision in refusing to enforce a summons as being overly broad; and that summons was very similar to the summons in the instant case which appears to be a "standard form summons" used by the IRS to churches and various charitable organizations.

B. THIS SUBPOENA VIOLATES THE FIRST AMENDMENT "FREEDOM OF ASSOCIATION" RIGHTS OF THE CHURCH AND ITS MEMBERS BY THE NATURE OF THE DOCUMENTATION IT IS DEMANDING

If the Court has already declared that organizations such as

the National Association for the Advancement of Colored People and the Communist Party need not turn over membership lists or contributor lists, how can the Seventh Circuit require the Christian Liberty Church to do the same? A subpoena such as this has a chilling effect upon the First Amendment right of "association" with others who may hold the same religious beliefs and who would be afraid of subpoenas and harassment.

In the case of *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782, the Court said:

> "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."

The Court, in *Kusper v. Pontikes*, 414 U.S. 51, 38 L.Ed.2d 260, 94 S.Ct. 303, pointed out in that and past decisions a significant encroachment upon associational freedom could not even be justified upon a "mere" showing of a legitimate state interest.

Along those lines, *California Bankers Assn. v. Schultz*, 416 U.S. 21, 39 L.Ed.2d 812, 94 S.Ct. 1494, pointed out that an organization, in addition to an individual, had standing to assert that its members be protected from governmentally compelled disclosure of their membership in the organization, and, in the absence of unusual circumstances, such information may not be compelled, citing *NAACP v. Alabama*, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958).

What the government seeks to do, among other things, is to obtain members of a clearly identifiable religious group with its subpoena.

The Supreme Court in the case of *Bates v. Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 pointed out that it is beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected activity, not only against heavy handed frontal attack but also from being stifled by more subtle governmental interference. The Court further pointed out that:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may consti-

> tute an effective . . . restraint of freedom of association."
>
> "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."
>
> ". . .Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

The *Bates* case basically is one that did not allow compulsory disclosure of the membership list of branches of the National Association for the Advancement of Colored People because it would be an interference with the freedom of association of its members.

Also, the Court pointed out in *Laird v. Tatum*, 408 U.S. 1, 33 L.Ed.2d 154, 92 S.Ct. 2318 that decisions in various cases must recognize that governmental action may be subject to constitutional challenge even though it may have even an indirect effect on the exercise of First Amendment rights. Further, our Supreme Court, in the case of *Gilmore v. City of Montgomery*, 417 U.S. 556, 41 L.Ed.2d 304, 94 S.Ct. 2416 points out that the freedom to associate applies to the beliefs we share.

It has been held that forced disclosure of one's associations and beliefs has a chilling effect on one's right under the First Amendment to free association. *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Sweezy v. New Hampshire* 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957). That problem is emphasized in this case, for when the associations and beliefs about which disclosure is sought relate to religion, there is also a danger that one's right to freely exercise religion will be chilled by forced disclosure.

CONCLUSION

Petitioners request that this Court take a careful look at the actual subpoena and fourteen extremely broad items requested therein. Obviously, the Appeals Courts are in conflict with the IRS rights with respect to subpoena of a church and its records. It certainly appears that the Seventh Circuit is in conflict with the Constitution, Sec. 7605(c) and prior decisions of the Sup-

reme Court and other appellate courts. The Supreme Court should grant the Writ of Certiorari so that these items can be fully and completely briefed. Counsel represents to the Court that he and the Petitioners have been contacted by at least three substantial national groups interested in this decision who have indicated that they intend to request to file briefs *amicus curiae* in the Court because of the far reaching significance of the Seventh Circuit decision in the instant case.

Many of the arguments and principles referred to above need further expansion and briefing.

Meanwhile, the inferior appellate courts, district courts, IRS, bar and religious and church organizations need guidelines which only the U.S. Supreme Court can provide.

Respectfully submitted,

Joseph W. Weigel
Weigel Law Firm
Counsel for Petitioners

Appendix

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2750

UNITED STATES OF AMERICA and HENRY GRANER, Exempt Organizations Specialist of the Internal Revenue Service..

Petitioners-Appellants,

v.

DALE K. DYKEMA, as Pastor of Christian Liberty Church, and CHRISTIAN LIBERTY COPORATION d/b/a CHRISTIAN LIBERTY ACADEMY and/or CHURCH OF CHRISTIAN LIBERTY.

Respondents-Appellees.

Appeal from the Judgment of the United States District Court for the Eastern District of Wisconsin.
No. 80-C-99—Myron L. Gordon, *Judge*.

ARGUED SEPTEMBER 21, 1981—
DECIDED DECEMBER 9, 1981

Before, CUMMINGS, *Chief Judge*, and PELL, *Circuit Judge*, and DUMBAULD,* *Senior District Judge*.

DUMBAULD, *Senior District Judge*. Before us for review is an order of the District Court denying enforcement under 26 U.S.C. 7604(a) of an Internal Revenue summons under 26 U.S.C. 7602. The summons was directed to Dale Dykema, pas-

*The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

tor of an autocephalous church known as the Christian Liberty Church,[1] located at 3675 N. Calhoun Road, Brookfield, Wisconsin and called for fourteen comprehensive categories of records belonging to the church. The stated purpose of the request was to enable a determination to be made by the US whether the church was an exempt organization under 26 U.S.C. 501(c)(3), and hence a proper recipient of deductible contributions under 28 U.S.C. 170(c)(2); whether the church was liable for any tax on unrelated business income under 26 U.S.C. 511-514; and whether Dykema individually was liable for any tax. (The individual liability of John H. Vouga, apparently an assistant pastor, is also under investigation.)

Insofar as the pastor's individual tax liability is concerned, the case is clear. His tax liability is to be investigated and established in the same manner as that of any other taxpayer. And in that connection records of other parties, including his employer, even though it be a church, may be examined if they are such as to throw light on his individual tax liability. *U.S. v. Grayson Co. Stage Bank*, 656 F 2d 1070, 1076 (C.A. 5, 1981); *U.S. v. Krilich, 470 F. 2d 341, 350 (C.A. 7, 1972)*. Such examination is subject only to the usual requirements "that the investigation [has] a legitimate purpose, that the inquiry may be relevant to the purpose, that [the IRS does not already have] the information sought, and that the administrative steps required by the Code have been followed." *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964)[2] These requirements have been met in the case at bar. Nor would such investigative authority of the IRS be diminished even if excessive and unreasonable payments from church funds to the pastor disclosed "inurement" to him, a circumstance which is of importance with respect to the exempt status of the church, as will shortly be seen.

[1]The church is said to be Calvinist in doctrine, but unconnected with any presbytery, synod, or general assembly. Is is said to be composed of approximately only 15 members, though a throng of spectators occupied the back rows of the courtroom during argument of the case.

[2]There is no occasion in the case at bar to examine the further complications that would arise if criminal prosecution were contemplated. See *U.S. v. White*, 309 F. Supp. 508, 509 (W.D. Pa. 1970); *U.S. v. Morgan Guaranty Trust Co.*, 572 F. 2d. 36, 39-41 (C.A. 2, 1978); *U.S. v. LaSalle Natl. Bank*, 437 U.S. 298, 316-18 (1978). The evidence shows that the intelligence agents earlier involved in the affairs of these taxpayers have "bowed out" of the case and that now only collection of tax is under consideration.

The District Court in the case at bar departed from the *Powell* standard of relevance by imposing a stricter requirement that the information sought must be "truly necessary" to enable the IRS to perform its statutory functions. This view is apparently based on the language of 26 U.S.C. 7605(c) that examination of the books of account of a church shall be made only "to the extent necessary" to determine the amount of tax on unrelated business income.

But this provision of the statute relates only to the topic of unrelated business income. It does not restrict the scope of examination with respect to other issues for determination by the IRS when investigating an allegedly exempt organization, *e.g.* whether the organization is in fact an exempt organization by reason of its being engaged in activities of the sort which Congress specified as proper for conferring exempt status, or whether part of the organization's net earnings inures to the benefit of any private shareholder or individual or whether it engages in propaganda to influence legislation or participates in political campaigning on behalf of any candidate for public office.

Indeed § 7605(b) itself expressly permits examination even of the *religious* activities of such an organization to the extent necessary to determine whether the organization is entitled to exempt status by reason of being a church.

Hence the District Court's application of a "truly necessary" standard is error. The *Powell* standard of relevance is appropriate to the inquiry as to the existence *vel non* of exempt status.

The exempt status of an organization depends on several factors, and is more complicated than the situation with regard to the individual tax liability of the pastor or other church employees.

In pertinent part, the tax exempt status defined in 26 U.S.C. 501(c)(3) is granted to "Corporations. . . organized and operated exclusively for religious. . . purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Thus the subsidiary topics concerning which the IRS is enti-

tled to inform itself[3] in investigating the tax exempt status of an organization include the following:

. 1. Is the organization properly *organized*, with a corporate structure suitable for carrying out religious purposes?

. In this connection the church's certificate of incorporation would be relevant and material. Apparently the IRS has already been furnished this document. Although perhaps issued at an earlier date than the tax years under investigation, the IRS should be able to determine without difficulty whether the charter had been revoked for any reason or was still in force during the pertinent period.

2. Is the organization *operated* exclusively for religious purposes?

In connection with this inquiry, it is necessary and proper for the IRS to survey all the activities of the organization, in order to detemine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business. Such a survey could be made by observation of the organization's activities or by the testimony of other persons having knowledge of such activities, as well as by examination of church bulletins, programs, or other publications, as well as by scrutiny of minutes, memoranda, or financial books and records relating to activities carried on by the organization.

Typical activities of an organization operated for religious purposes would include (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity *in partibus infidelium;* (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case

[3]It must be remembered that tax exemption is a privileged status and that the taxpayer claiming it has the burden of demonstrating entitlement thereto; and also that the IRS has a statutory duty *ex officio* "to canvass and to inquire" concerning all persons "who may be liable to pay any internal revenue tax." *Donaldson v. U.S.*, 400 U.S. 517, 523 (1971); 26 U.S.C. 7601. This inquisitorial function is akin to that of a grand jury, and no probable cause" is necessary before a summons is issued to a particular taxpayer. *U.S. v. Powell*, 379 U.S. 48, 56 (1964).

of mature and well developed churches) theological seminaries for the advanced study and the training of ministers.

Objective criteria for examination of an organization's activities thus enable the IRS to make the determination required by the statute without entering into any subjective inquiry with respect to religious truth which would be forbidden by the First Amendment. *U.S. v. Ballard*, 322 U.S. 78, 86-88 (1944).[4] Likewise there is no "establishment of religion" involved in determining that entitlement to tax exemption has been demonstrated *vel non*.[5] As well said by Chief Justice Burger in *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970); "There is no genuine nexus between tax exemption and establishment of religion." Indeed, it should be emphasized that no real questions regarding "religion" as referred to in the First Amendment[6] are involved in the case at bar at all; the word "religious" concerns us merely in its statutory meaning as a description of a type of organization which Congress chose to exempt from taxation, believing that such relief from the tax burden would be beneficial and desirable in the public interest.[7]

The term "religious purposes" is simply a term of art in tax law, just like "collapsible corporation" or "Section 306 stock."[8] In that connection it must be remembered that more than 20 other types of exempt organizations, besides those for religious purposes, are listed in 26 U.S.C. 501(c). The IRS has the same monitoring function with respect to all these groups, namely to determine whether their actual activities conform to the re-

[4]In *Ballard*, Justice Jackson exclaimed: "I would. . . have done with this business of judicially examining other people's faiths." 322 U.S. at 95.

[5]Clearly also there is no continuing supervision or regulation of the religious mission of the organization such as was condemned in *NLRB v. Catholic Bishop of Chicago*, 440 US. 490, 501-502 (1979).

[6]For a good recent exposition of the significance of "religion" in the constitutional sense, see opinion of Judge Adams in *Africa v. Commonwealth of Pennsylvania et al*, (3rd Cir. October 30, 1981), No. 81-2325. (Prisoner not entitled to diet of raw foods as a requirement of religion founded by himself.) The same court will doubtless soon be confronted with the question whether the First Amendment authorizes perpetration of bank robberies by members of a sect in order to raise money for the support of their religion. Seventeen members of the New World of Islam were recently convicted in Newark for such offenses. New York Times, November 6, 1981. See also *Heffron v. Int. Soc. for Krishna Consciousness*, 69 L. Ed. 298, 309 (1981).

[7]See *Walz. supra*, 397 U.S. at 673.

[8]"Section 306 stock" is defined in 26 U.S.C. 306(c).

quirements which Congress has established as entitling them to tax exempt status.[9]

Since Biblical times it has been recognized that taxation belongs among "the things which are Caesar's." As narrated by an ex-tax collector:

> Shew me the tribute money. And they brought unto him a penny.
>
> And he saith unto them, Whose is this image and superscription?
>
> They say unto him. Caesar's. Then saith he unto them. Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's. [Matthew 22:19-21. See also Mk. 12:15-17; Lk. 20:24-25.]

3. Does any part of the organization's net earnings inure to the benefit of any private shareholder or individual?

This is the third question which must be addressed by the IRS in determining exempt status under § 501(c)(3). As previously indicated, if the pastor, for example, received an unreasonable or excessive salary[10] out of the net earnings from the operation of the church, the organization is not entitled to exempt status.

In connection with this factor, the financial books and records of the church would be relevant and important items for scrutiny by the IRS.

4. Does a substantial part of the activities of the organization consist of attempting to influence legislation?

Here the correspondence and publications of the organization would constitute significant data. Scrutiny of the activities of the organization *in toto* would be necessary in order to appraise and measure whether the forbidden conduct amounted to a *"substantial"* part of the organization's total activities. The financial records might also be useful in ascertaining the existence *vel non* of any payments to legislators and the like.

[9]For an illustration of the quagmire of litigation arising with respect to whether a social club lost its exempt status under 26 U.S.C. 501(c)(7) by reason of excessive use of club facilities by non-members, see *Pittsburgh Press Club v. U.S.*, 388 F. Supp. 1269 (W.D. pa 1975); 536 F. 2d 572 (C.A. 3, 1976); 426 F. Supp. 553 (W.D. Pa. 1977); 579 F 2d 751 (C.A. 3, 1978); 462 F. Supp. 322 (W.D. pa. 1978); 615 F 2d 600 (C.A. 3, 1980).

[10]The test of unreasonable compensation here would be similar to that for determining deductibility of salaries paid by a business corporation. *Founding Church of Scientology v. U.S.*, 412 F. 2d 1197, 1200-1201 (Ct. Claims, 1969) [pastor received 10% of church's gross income.].

5. Does the organization participate in political campaigns on behalf of any candidate for public office?

Here the same type of data as in item 4 would be useful.

It should also be noted that exemption is lost under this item 5 by participation in *any* political campaign on behalf of *any* candidate for public office. It need not form a *substantial* part of the organization's activities.

Quaere whether participation in a political campaign *against* a candidate for public office is forbidden or participation in a political campaign relating to neither legislation nor the election of public officials (if there exists any such type of political campaign)?

It will be noted that inquiry concerning the foregoing matters, relating to the issue whether the organization under scrutiny is a church or not is not restricted by 28 U.S.C. 7605(c) in any respect. To that extent § 7605(c) expressly permits examination of the religious activities of the organization. If such examination were not permitted, it is difficult to see how any church could qualify as a tax-exempt organization "for religious purposes."

With respect to the third question under examination by the IRS in the case at bar (whether the church was liable for any tax on unrelated business income) further complications must be taken into account. In the first place, procedurally, the restrictions of 26 U.S.C. 7605(c) *do* apply.[11] Secondly, and substantively, it must be determined what constitutes unrelated business income.

[11] 26 U.S.C. 7605 provides:

> No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax under part III of subchapter F of chapter 1 of this title (sec. 511 and following, relating to taxation of business income of exempt organizations) unless the Secretary (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title.

With regard to the procedural question, a high-ranking IRS officer must *believe* that the organization may be engaged in carrying on an unrelated trade or business or otherwise taxable activity; and so notify the organization in advance of the examination. Moreover, the examination of corporate books of account must be limited to that which is necessary to determine the amount of tax imposed.[12]

The concept of tax on unrelated business income of an exempt organization became part of the Internal Revenue Code in 1950. With respect to churches it became effective for tax years beginning after December 31, 1969.[13] The 1950 legislation was inspired by a desire to eliminate unfair competition between ordinary commercial companies and similar companies owned by a tax-exempt organization. Before 1950, a "feeder" company all of whose income was destined for a tax-exempt holding company, even though the source of its income was from a commercial trade or business, was itself treated as a tax-exempt organization. The best-known example of this abuse was the macaroni company operated for the benefit of the New York University law school.[14]

The post-1950 system was also more satisfactory than the old in that it permitted a tax-exempt organization to engage in an unrelated profit-making trade or business without risking the complete loss of tax-exempt status. Previously such status was jeopardized by engaging in substantial unrelated commercial operations.[15]

[12]To determine the *amount* of tax liability, there would need to be a prior determination with respect to the *existence* of such a liability by reason of the corporation's carrying on an unrelated trade or business. The books of account could therefore be used *in limine* to resolve that issue.

[13] Section 301 of the Act of September 23, 1950, 64 Stat. 948 amended sections 421 and 422 of the 1939 Code. These provisions were carried over into sections 511-514 of the 1954 Code. The exclusions of churches from the application of the tax on unrelated business income was repealed when Section 121 of the Act of December 30, 1969, 83 Stat. 536, amended Section 511(a)(2)(A) of the 1954 Code by deleting the words "(other than a church, a convention or association of churches. . .)."

[14] *C.F. Mueller Co. v. C.I.R.*, 190 F 2d 120, 121 (C.A. 3, 1951).

15 Thus an art museum would probably be permitted to sell photographic reproductions of masterpieces in its collection, for thereby its educational function of making such masterpieces available to the public would be furthered. Likewise an agricultural college might operate a wheat farm. Similarly a church could probably sell Bibles. But not operate a winery or distillery. *De LaSalle Institute v. U.S.* 195 F. Supp. 891, 901 (N.D. Calif. 1961). See also note 9 *supra*.

The term "unrelated trade or business" is defined by 26 U.S.C 513(a) as "any trade or business the conduct of which is not substantially related. . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501." It was expressly provided that notwithstanding its engaging in taxable unrelated business the organization did not lose its tax exempt status with regard to the activities which qualified it as a tax exempt organization. 26 U.S.C. 501(b).

Although the law contains detailed lengthy provisions relating to particular types of organizations, the foregoing account of the pertinent provisions relating to a church indicates with sufficient accuracy the extent of the monitoring function of the IRS in inquiring into the unrelated business income of a church. Any evidence tending to show that the church did or did not engage in an unrelated trade or business would be pertinent to an investigation of this topic and would support a summons (subject, as noted above, to the restrictions contained on 26 U.S.C. 7605(c)).

Having reviewed the nature and extent of the matters to be inquired into by the IRS in connection with determination of potential tax liabilities arising in connection with the activities of tax-exempt organizations, we shall now turn our attention to the question whether (and to what extent) the material subpoenaed by the IRS summons directed to Dykema and his Christian Liberty Corporation is relevant and material to the inquiries which it is the statutory duty of the IRS to pursue.

Item 1 of the summons calls for records of receipts and disbursements during the tax years under investigation (1975-1978). In particular it seeks records of contributions to the organization and of sales of merchandise and payroll records. It seems clear that this information would be relevant to determining whether the organization was a church supported by members or a commercial organization whose income was derived from sales of merchandise. Payroll records would also show whether the employees were a normal church staff or a commercial sales organization.

Item 2 calls for balance sheets for the period in question. This is a normal type of financial record and would undoubtedly be useful to the investigation.

Item 3 requests documents related to the church's organiza-

tional structure and is essential to the question of organization, as previously discussed.

Item 4 calls for correspondence files. As previously indicated, this would be relevant to determination whether normal church-type activities were being conducted, or commercial operations, or attempts to influence legislation or elect political candidates.

Item 5 asks for names of officers, directors, trustees or ministers. This is obviously an appropriate request. Similarly, Item 6, calling for minutes of meetings, is obviously a proper means or scrutinizing the official actions of the organization.

Item 7 calls for specimens of publications. The value of such literature for the investigation has previously been indicated.

Item 8 asks for names of persons ordained or otherwise given recognition by the organization. While it is unlikely that a small church such as involved here would be involved in such activities, it is easy to simply answer "none" if that is the case. The inquiry is appropriate as standard "boiler plate" material since a number of meretricious religious groups do operate "diploma mills" purporting to license "ministers" indiscriminately.

Similar considerations apply to Item 9, inquiring as to subordinate affiliates.

Item 10 simply seeks documentary evidence of the performance of sacerdotal functions. This is obviously a proper inquiry, as is Item 11 which seeks "documents reflecting the principles, creeds, precepts, doctrines, practices and disciplines" espoused by the organization. In like vein item 12 calls for documents reflecting conditions for church membership or ordination.

Item 13 inquires as to vows of poverty." Here again it is unlikely that this inquiry affects this particular small church, but again it is easy to return a simple negative answer, if appropriate. The inquiry is proper for a standard IRS list since it is common knowledge that such vows have been known in Roman Catholic tradition for many centuries. A notable example is St. Francis of Assisi.

Item 14 seeks documentary evidence of assignment of income to the organization. This, like item 1, would be pertinent to the demonstration of religious as contrasted with commercial purposes, but would also relate to possible issues of "inurement" which have been previously discussed as a significant statutory

factor in the determination which the IRS is charged with the duty of making.

In short, detailed examination of the fourteen items embraced in the summons discloses that all of them are appropriate inquiries relevant and necessary to the proper performance of tasks entrusted to the IRS by Congress. There is no good reason shown why the data sought should not be produced. The decision of the District Court must be reversed, with directions to enforce the summons in accordance with 26 U.S.C. 7604(a).

Reversed.

A true Copy;
Teste;

Clerk of the United States Court of Appeals
for the Seventh Circuit

APPENDIX B

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE

EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 80-C-99

UNITED STATES OF AMERICA, et. al.

Plaintiff

vs.

DALE K. DYKEMA,

Defendent

This action came on for trial (hearing) before the Court, Honorable Myron L. Gordon, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the petition is dismissed.

Dated at Milwaukee, WI. this 2nd day of October 1980.

Clerk of Court

APPENDIX C

DECISION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
HENRY GRANER, Exempt
Organizations Specialist of
the Internal Revenue Service,

Petitioners,

v. No. 80-C-99

DALE K. DYKEMA, as Pastor of (Filed September 22, 1980)
Christian Liberty Church, and
CHRISTIAN LIBERTY CORPORATION
d/b/a CHRISTIAN LIBERTY ACADEMY,
and/or CHURCH OF CHRISTIAN
LIBERTY,

Respondents.

DECISION AND ORDER

This is a petition to enforce a summons issued by the Internal Revenue Service (IRS) pursuant to 26 U.S.C. § 7602. The matter came on for a hearing before the United States magistrate for this district; after receiving the parties' post-hearing brief, the magistrate issued a report with recommended findings of fact and conclusions of law. The magistrate has recommended that the court deny enforcement of the petition on the ground that the summons is overbroad.

Pursuant to 28 U.S.C § 636(b)(1)(B) & (C), and local Rule 13.03, both sides have filed written objections to the magistrate's report. Accordingly, the action is before me to "make a *de novo*

determination of those portions [of the report] to which objection is made and . . . [to] accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate." Local rule 13.03(b).

The purpose of the IRS investigation is to determine whether the respondent, Christian Liberty Corporation, d/b/a Christian Liberty Academy, and/or Church of Christian Liberty, qualified for treatment as a tax-exempt organization under the Internal Revenue Code between January 1, 1975, and December 31, 1978, and to determine whether the respondent church, and Dale K. Dykema, pastor of the Christian Liberty Church, are liable for any taxes due under the code during the same period. The summons seeks various books and records within fourteen different categories of information including:

> "All documents related to the organizational structure of the above-named organization since the original Articles of Incorporation, charter, by-laws were issued, including any amendments made thereto. . .
>
> "All correspondence files for the period January 1, 1975 through the year ended December 31, 1978. . .
>
> "All minutes of any meetings held by the above officers, directors, trustees, or ministers of the above-named organization during the period January 1, 1975 through the year ended December 31, 1978. . .
>
> "One sample of each brochure, pamphlet, handout, program or other literature pertaining to the above-named organization."

At the magistrate's hearing, the petitioner Henry Graner, who is an "exempt organizations specialist" for the IRS, was the only witness to testify. Mr. Graner acknowledged that the respondents had supplied the IRS with some information, namely, a copy of the church constitution, documents reflecting sacerdotal functions, literature pertaining to school activities and policies, a copy of blank contracts for teachers and ministers, a schedule of church officers for the year 1979, and an IBM ledger printout for the year 1979. Also, Mr. Graner testified that he had visited the respondent's facility and had witnessed various class sessions and spoken to members of the church

board about the church's activities. However, Mr. Graner maintained that this information was insufficient to permit him to make the determinations regarding the church's tax exempt status.

The magistrate found, *inter alia*, that the IRS complied with applicable rules and regulations prior to issuance of the summons and that the summons was issued for a legitimate purpose. I have considered the respondent's objections to these findings of fact and am persuaded that such objections are without merit. Clearly, the first amendment presents no obstacle to enforcement of the instant summons. **See** *United States v. Holmes*, 614 F.2d 985, 989-90 (5th Cir. 1980); *United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1980).

A closer question is presented in determining whether the scope of the summons is overbroad. The principles governing judicial enforcement of an administrative summons are well-settled. Issuance of an IRS summons must precede any recommendation of criminal prosecution, and the summons must be issued in good faith. **See** *United States v. LaSalle National Bank*, 437 U.S. 298, 318 (1978). To demonstrate good faith, the IRS must show that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to the purpose; (3) the information sought is not already in the possession of the IRS; and (4) the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell*, 379 U.S. 48, 58 (1964).

In 1969, Congress added the following provision to the Internal Revenue Code, 26 U.S.C. § 7605(c):

> "No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax. . . unless the Secretary (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such an organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent

> necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title."

Relying on *United States v. Holmes, supra,* the magistrate concluded that the just-quoted section narrows the scope of the inquiry which the IRS may undertake with respect to religious organizations. Under *Holmes,* to demonstrate its good faith when issuing a summons to a church, the IRS must show that the information sought is necessary for it to make the statutory determinations. 614 F.2d at 988. Under *United States v. Powell, supra,* 379 U.S. at 58, the IRS had only to show that the information "may be relevant" to the purpose of the investigation. In *United States v. Freedom Church, supra,* which the magistrate distinguished from the case at bar, the court of appeals failed to address the question whether § 7605(c) narrows the *Powell* good faith standard regarding the scope of the inquiry; however, the court did enforce a summons similar in breadth to the instant summons under the *Powell* "may be relevant" standard.

I have examined Mr. Graner's testimony which is set forth in the transcript. He explained the need for the materials called for in the summons, asserting that the materials were required to enable the IRS to make the appropriate determinations regarding the church's tax exempt status. However, I join in Magistrate Goodstein's finding that Mr. Graner's testimony as to necessity is basically conclusory.

While the church's literature and correspondence may, in a broad sense, helpful to the IRS in establishing the church's operational practices, I am unable to hold that such materials are truly necessary to enable the IRS to perform its statutory functions. This is particularly true in view of the many documents and records already supplied by the church. In conclusion, I find no basis for enforcing the summons.

Therefore, IT IS ORDERED that the objections filed by both sides to the magistrate's report be and hereby are denied.

IT IS ALSO ORDERED that the magistrate's report be and hereby is adopted.

IT IS FURTHER ORDERED that the petition be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 22nd day of September, 1980.

U.S. District Judge

APPENDIX D

FINDINGS AND CONCLUSIONS UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

United States District Court
Eastern District of Wisconsin

UNITED STATES OF AMERICA and
HENRY GRANER, Exempt
Organizations Specialist of
the Internal Revenue Service
Petitioners

v. Civil No. 80-C-99

DALE K. DYKEMA, as Pastor of
Christian Liberty Church, and
CHRISTIAN LIBERTY CORPORATION d/b/a
CHRISTIAN LIBERTY ACADEMY and/or
CHURCH OF CHRISTIAN LIBERTY,
Respondents.

REPORT WITH RECOMMENDED FINDINGS AND CONCLUSIONS

The above-entitled matter came on for hearing before the undersigned on April 1, 1980, pursuant to an Order to Show Cause why the respondents should not be compelled to obey the Internal Revenue Service summons served upon them. Dale K. Dykema as Pastor of Christian Liberty Church appeared along with attorney for the respondents Kevin Sjostrom. Jeffrey Snow, attorney, Tax Division, Department of Justice, Washington, D.C. appeared on behalf of the petitioners.

The I.R.S. is seeking various books and records of the respondents. The materials requested are set forth on a fourteen item attachment to the summons. The purpose of this examination, as set forth in the petition to enforce the I.R.S. summons and the agent's declaration, is three-fold:

1. To determine whether Christian Liberty Corporation, d/b/a Christian Liberty Academy, and/or Church of Christian Liberty qualified under Section 501(c)(3) of Title 26, U.S.C.;

2. To determine whether the said taxpayer qualifies as an organization to which contributions are deductible under the Internal Revenue Code of 1954;

3. To determine the amount of tax, if any, imposed by the Internal Revenue Code of 1954 upon the said taxpayer or upon Dale K. Dykema and/or John H. Vouga.

The Respondents object to the enforcement of the summons on several grounds. They contend that the I.R.S. already has sufficient information in its possession to make the foregoing determinations; that the information sought impermissibly intrudes upon respondents' religious freedom; that the I.R.S. has failed to satisfy the statutory prerequisites for enforcement of the summons; and that the summons itself is overbroad in scope.

At the hearing, the only witness was Henry Graner, an exempt organization specialist for the I.R.S. His testimony was received together with certain documentary evidence. Following the hearing, both parties submitted legal memoranda in support of their respective positions.

DISCUSSION

Several requirements must be met before judicial enforcement of a summons is permitted. First, the summons must be issued before the I.R.S recommends to the Department of Justice that a criminal prosecution be undertaken. Secondly, the I.R.S must use the summons authority in good-faith pursuit of the congressionally authorized purpose of 26 U.S.C. §7602. *United States v. LaSalle National Bank*, 437 U.S. 298, 318 (1978).

The standards of good faith are enunciated in *United States v. Powell*, 379 U.S. 48 (1964). The I.R.S. must show: 1) that the investigation will be conducted pursuant to a legitimate purpose; 2) that the inquiry may be relevant to the purpose; 3) that the information sought is not already in possession of the I.R.S.; and 4) that the administrative steps required by the Internal Revenue Code have been followed. Once the I.R.S. establishes a *prima facie* case for enforcement, the burden shifts to the taxpayer to show that enforcement would be an abuse of the court's process. See *Powell*, supra at p. 58.

In regard to the examination of churches, the second re-

quirement of the *Powell* test is subject to the provisions of subsection (c) of 26 U.S.C. §7605. That section provides as follows:

> "No examination of the books of account of a church. . . shall be made to determine whether such organization may be engaged in the carrying out of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax. . . unless the Secretary or his delegate. . . believes that such organizations may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made **except to the extent necessary** to determine whether such organization is a church. . . and no examination of the books of account of such organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title." (emphasis supplied)

The most recent case of *United States v. Holmes*, 614 F. 2d 985 (5th Cir., 1980), discussed the limiting applications of §7605(c) upon summons enforcement proceedings against churches and religious organizations. In that case, the documents requested were identical to those requested in the fourteen numbered paragraphs of the summons in the instant case except for different dates and names.

The taxpayer in *Holmes* refused to supply the requested information, but the appellate court vacated the order for enforcement of the summons on the ground that it was too far-reaching. The court stated that the second prong of the *Powell* test (that the inquiry be relevant) was restricted by the "extent necessary" language of §7605(c). Since the trial court made no finding that the documents sought were necessary to make a determination as to the status of the respondent church or the amount of tax owing, this requirement was not met.

The *Holmes* court concluded by stating,

> "We vacate the order of enforcement because it countenances a summons of impermissible scope."
>
> *Holmes*, supra at p. 998

In this case, the testimony of Henry Graner reveals that the respondents, unlike Holmes, did furnish him with certain documents. He received a constitution of the church which enumerated its operational activities, documents reflecting sacerdotal functions, literature pertaining to school activities and

policies, a copy of blanket contracts for teachers and ministers, a schedule of church officers and and I.B.M. ledger printout for the year 1979.

In addition, Mr. Graner visited the facility and witnessed various class sessions. On the day of his visit he had an oppoortunity to speak with members of the church board regarding the church activities.

In spite of this, Mr. Graner testified that he had not received sufficient information in order to make a determination as to whether or not the organization qualified as a tax-exempt entity under the Internal Revenue Code.

The burden is upon the government to establish the relevancy of the information sought. In this case, the government must further show that such information is relevant to the "extent necessary" to make the appropriate determinations.

The *Holmes* court held that an identical summons was overbroad. Here, the government has failed to specifically demonstrate why the numerous categories of materials are relevant. The record only contains the conclusory testimony of Mr. Graner that the information is necessary. In view of the fact that he has already received substantial information, his conclusions are not sufficient to sustain the government's burden.

In support of its position, the government cites the case of *United States v. The Freedom Church*, 613 F. 2d 316 (1st Cir., 1979), which upheld the enforcement of a summons of similar scope. However, in that case, the respondent failed to raise any objection regarding the issue of relevancy at the show cause hearing before the magistrate. He simply refused to answer any questions upon various constitutional grounds, and only made generalized objections at a subsequent hearing before the district court. The court in that case concluded that the government had established its *prima facie* case. Therefore, the case is factually distinguishable from the instant situation.

The foregoing shall constitute findings of fact and conclusions of law, and are *in pari materia* with the specific paragraphs below:

FINDINGS OF FACT

1. This Court has jurisdiction of this matter under Title 26, United States Code, Sections 7402(b) and 7604(a). The respondents are located at 3875 N. Calhoun Road, Brookfield, Wisconsin and within the jurisdiction of this Court.

2. The petitioner, Henry Graner, is a Revenue Agent of the Internal Revenue Service, exempt organization specialist, and is performing his duties under the direction of the District Director of Internal Revenue, St. Paul, Minnesota. He is authorized to issue Internal Revenue Service summonses under the authority of Title 26, United States Code, Section 7602.

3. In the course of his duties as a Revenue Agent, Henry Graner has been engaged in an examination pertaining to tax liability, if any, and exempt status of The Christian Liberty Corporation, d/b/a, The Christian Liberty Academy or The Church of Christian Liberty for four years ending December 31, 1975, December 31, 1976, December 31, 1977, and December 31, 1978.

4. The respondents are in possession and control of the testimony and documents being sought by petitioner.

5. On August 31, 1979, an Internal Revenue Service summons was personally served on Dale K. Dykema, as Pastor of The Christian Liberty Church.

6. Prior to serving the Internal Revenue Service summons on the respondents, the Internal Revenue Service by its District Director of Internal Revenue, St. Paul, Minnesota, and the Regional Commissioner, Internal Revenue Service, exchanged correspondence with the Christian Liberty Church in accordance with 26 C.F.R. Section 301.76051(c)(2).

7. The Internal Revenue Service has complied with the applicable statutes, rules and regulations necessary as a prerequisite to the issuance of a summons.

8. That the testimony of Henry Graner at the hearing held April 1, 1980, together with his Declaration as previously submitted and the petition to enforce the summons establishes that there is no improper motive or purpose behind the summons and that the petitioner is seeking information for the following legitimate purposes:

(a). To determine whether Christian Liberty Corporation, d/b/a Christian Liberty Academy, and/or Church of Christian Liberty qualifies under Section 501(c)(3) of Title 26, U.S.C.;

(b) To determine whether the said taxpayer qualifies as an organization to which contributions are deductible under the Internal Revenue Code of 1954;

(c) To determine the amount of tax, if any, imposed by the Internal Revenue Code of 1954 upon said taxpayer or upon Dale K. Dykema and/or John H. Vouga.

9. The Internal Revenue Service is in possession of certain documents, pursuant to an agreement between Petitioners and previous counsel for Respondents, including documents reflecting sacerdotal functions, IBM printouts for ledger accounts for the year 1979, schedule of church officers, copy of blanket contract for ministers and teachers, church constitution and articles of incorporation for the Christian Liberty Corporation.

CONCLUSIONS OF LAW

The Internal Revenue Service summons, utilized to determine tax liability of the Respondents for the years 1975 through 1978, which seeks all documents relating to the organizational structure of the church since its inception, all church correspondence files, minutes of all church meetings of officers, directors, trustees or ministers during that period of time, and samples of every piece of literature pertaining to the church, *inter alia*, is overly broad, and as such, unenforceable in its present form. *United States v. Holmes*, 614 F. 2d 985 (5th Cir., 1980).

Based upon the foregoing, it is recommended that the District Court enter an order denying enforcement of the Summons and dismissing the Petitioner's Order to Show Cause.

Pursuant to 28 U.S.C §636(1)(B) and (C), and Local Rule 13.03, parties shall have ten days from the date hereof to file written objections to the foregoing Report with the Clerk of Court, with extra copies delivered to the Chambers of the Honorable Myron L. Gordon, Room 271, and the Chambers of the undersigned, Room 496 of this Courthouse.

Dated at Milwaukee, Wisconsin this 31st day of July, 1980.

AARON E. GOODSTEIN
U.S. MAGISTRATE

APPENDIX E

SUMMONS

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of
Christian Liberty Corporation Corporation d/b/a Christian Liberty Academy, Church of Christian Liberty, Dale K. Dyema and/or John H. Vouga
Internal Revenue District of St. Paul, Minnesota.

Periods Ending 12/31/75, 12/31/76, 12/31/77 and 12/31/78

Commissioner of Internal Revenue
Dale K. Dykema, as Pastor of Christian Liberty Church
3675 North Calhoun Road
Brookfield, WI 53005

You are hereby summoned and required to appear before Henry Graner, officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

See attached pages (2)

Business address and telephone number of Internal Revenue Service officer named above:
517 East Wisconsin Avenue
Rm. 551
Milwaukee, WI 53202.
(414) 291-1311

Place and time for appearance:
517 East Wisconsin Avenue
Rm. 551
Milwaukee, WI 53202

on the 21st day of September, 1979 at 9:00 o'clock A.M.

Issued under authority of the Internal Revenue Code this 31st day of August, 1979.

Henry Graner	Internal Revenue Agent
Signature of Issuing Officer	Title

Original to be kept by IRS

Form 2039(Rev. 11-78)

1. All records pertaining to cash receipts and disbursements, including but not limited to, bank accounts, deposit slips, cancelled checks, records of contributions to the above-named organization, records of contributions by the above-named organization, sales of merchandise, payroll records, and records related to the payment of employment or social security taxes for the period beginning January 1, 1975 through the year ended December 31, 1978.

2. All balance sheets and other statements of financial condition covering the period from January 1, 1975 through the year ended December 31, 1978, including but not limited to those showing the assets and liabilities of the above-named organization.

3. All documents related to the organizational structure of the above-named organization since the original Articles of Incorporation, charter, by-laws were issued, including any amendments made thereto.

4. All correspondence files for the period January 1, 1975 through the year ended December 31, 1978.

5. All records of the names and addresses of persons who are or have been officers, directors, trustees, or ministers of the above-named organization at any time during the period January 1, 1975 through the year ended December 31, 1978.

6. All minutes of any meetings held by the above officers, directors, trustees, or ministers of the above-named organization during the period January 1, 1975 through the year ended December 31, 1978.

7. One sample of each brochure, pamphlet, handout, program or other literature pertaining to the above-named organization.

8. All records reflecting the names of any employees, associates or ministers of the above-named organization, particularly any records reflecting the names of the individuals who have been presented credentials of ministry, certificates of ordination, diplomas, or similar statements of recognition by the above-named organization.

9. All records reflecting the names of any other organizations that have been chartered as churches by the above-named organization or that have been affiliated with the above-named organization at any time during the period January 1, 1975 through the year ended December 31, 1978.

10. Documents reflecting any sacerdotal functions performed by any person representing the above-named organization.

11. All documents reflecting the principles, creeds, precepts, doctrines, practices, and disciplines espoused by the above-named organization.

12. All documents reflecting any prerequisites or actions necessary for memberhip in or ordination by the above-named organization.

13. All documents reflecting any vows of poverty that have been submitted to the above-named organization by any person during the period January 1, 1975 through the year ended December 31, 1978.

14. All documents reflecting any assignment of income to the above-named organization by any person during the period January 1, 1975 through the year ended December 31, 1978.

APPENDIX F

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

APPENDIX G

SEC. 7605(b). RESTRICTION ON EXAMINATION OF CHURCHES.

No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax under part III of subchapter F of chapter 1 of this title (sec. 511 and following relating to taxation of business income of exempt organizations) unless the Secretary (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title.

APPENDIX H

SEC. 501(c).

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

APPENDIX I

SEC. 508. SPECIAL RULES WITH RESPECT TO SECTION 501(c)(3) ORGANIZATIONS.

Sec. 508(a). (a) NEW ORGANIZATIONS MUST NOTIFY SECRETARY THAT THEY ARE APPLYING FOR RECOGNITION OF SECTION 501(c)(3) STATUS— Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3):

(1) unless it has given notice to the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of such status, or

(2) for any period before the giving of such notice, if such notice is given after the time prescribed by the Secretary by regulations for giving notice under this subsection.

SEC. 508(b). PRESUMPTION THAT ORGANIZATIONS ARE PRIVATE FOUNDATIONS.

Except as provided in subsection (c), any organization (including an organization in existence on October 9, 1969) which is described in section 501(c)(3) and which does not notify the Secretary, at such time and in such manner as the Secretary may by regulations prescribe, that it is not a private foundation shall be presumed to be a private foundation.

SEC. 508(c). EXCEPTIONS.

(1) MANDATORY EXCEPTIONS — Subsections (a) and (b) shall not apply to —

(A) churches, their integrated auxiliaries, and conventions or associations of churches, or

(B) any organization which is not a private foundation (as defined in section 509(a)) and the gross receipts of which in each taxable year are normally not more than $5,000.

(2) EXCEPTIONS BY REGULATIONS — The Secretary may by regulations exempt (to the extent and subject to such conditions as may be prescribed in such regulations) from the provisions of subsection (a) or (b) or both —

(A) educational organizations described in section 170(b)(1)(A)(ii), and

(B) any other class of organizations with respect to which the Secretary determines that full compliance with the provisions of subsections (a) and (b) is not necessary to the efficient administration of the provisions of this title relating to private foundations.

APPENDIX J

SEC. 6033. RETURNS BY EXEMPT ORGANIZATIONS.

Sec. 6033(a) ORGANIZATIONS REQUIRED TO FILE —

(1) IN GENERAL — Except as provided in paragraph (2), every organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Secretary may from time to time prescribe; except that, in the discretion of the Secretary, any organization described in section 401(a) may be relieved from stating in its return any information which is reported in returns filed by the employer whch established such organization.

(2) EXCEPTIONS FROM FILING —

(A) MANDATORY EXCEPTIONS — Paragraph (1) shall not apply to —

(i) churches, their integrated auxiliaries, and conventions or associations of churches,

(ii) any organization (other than a private foundation, as defined in section 509(a))described in subparagraph (C), the gross receipts of which in each taxable year are normally not more than $5,000, or

(iii) the exclusively religious activities of any religious order.

(B) DISCRETIONARY EXCEPTIONS — The Secretary may relieve any organization required under paragraph (1) to file an information return from filing such a return where he determines that such filing is not necessary to the efficient administration of the internal revenue laws.

(C) CERTAIN ORGANIZATIONS — The organizations referred to in subparagraph (A)(ii) are —

(i) a religious organization described in section 501(c)(3);

(ii) an educational organization described in section 170(b)(1)(A)(ii);

(iii) a charitable organization, or an organization for the prevention of cruelty to children or animals, described in section 501(c)(3), if such organization is supported, in whole or in part, by funds contributed by the United States or any State or political subdivision thereof, or is primarily supported by contributions of the general public;

(iv) an organization described in section 501(c)(3), if such organization is operated, supervised, or controlled by or in connection with a religious organization described in clause (i);

(v) an organization described in section 501(c)(8); and

Opposition

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1665

In the Supreme Court of the United States

OCTOBER TERM, 1981

DALE K. DYKEMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
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QUESTIONS PRESENTED

1. Whether, in a summons enforcement proceeding in furtherance of a tax investigation of an organization claiming to be a tax-exempt church, Section 7605(c) of the Internal Revenue Code of 1954 requires the government, as a prerequisite for enforcement of an Internal Revenue Service summons seeking production of church records, to establish probable cause to believe that the organization either is engaged in activities that disqualify it as a tax-exempt entity, or is engaged in unrelated business income-producing activities.

2. Whether the government made a sufficient showing in this case of the relevance of the material summoned to the completion of a proper investigation, in accordance with requirements of Section 7605(c).

3. Whether enforcement of the summons will violate the First Amendment rights of association of the members of the church.

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In the Supreme Court of the United States

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DALE K. DYKEMA, ET AL., PETITIONERS

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the district court (Pet. App. C-1 to C-5) was entered September 22, 1980, and is not officially reported. The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 666 F. 2d 1096.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1981. The petition for a writ of certiorari was filed on March 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 7605(c) of the Internal Revenue Code of 1954 (26 U.S.C.) provides as follows:

(c) [as added by Section 121(f), Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 548]. *Restriction on Examination of Churches.*—No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax under part III or subchapter F of chapter 1 of this title (sec. 511 and following, relating to taxation of business income of exempt organizations) unless the Secretary (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title.

STATEMENT

The United States and Henry Graner, an Internal Revenue Service agent, brought this action in the United States District Court for the Eastern District of Wisconsin, seeking enforcement of an Internal Revenue summons issued by Graner to petitioner Dale K. Dykema, in his capacity as pastor of the Christian Liberty Church. The summons sought the production of records in 14 general categories for inspection by Agent Graner for the purpose of ascertaining, for the years 1975 through 1978, whether (1) the Church qualified as a tax-exempt organization under Section 501(c)(3) of the Code; (2) the Church was eligible to

receive tax deductible contributions under Section 170(c)(2) of the Code; and (3) the Church was liable for taxes on unrelated business income under Section 511 of the 1954 Code. Agent Graner was also investigating petitioner Dykema's individual income tax liability (Pet. App. A-1 to A-2).

Petitioners objected to enforcement of the summons, contending that they voluntarily had given the Internal Revenue Service sufficient information to complete its investigation; that enforcement of the summons would violate the First Amendment rights of the members of the church; that the government had not made the required prima facie showing that it was entitled to enforcement; and, finally, that the summons was overbroad (Pet. App. D-2). After an evidentiary hearing before a magistrate, at which Agent Graner was the sole witness, the magistrate found that the Internal Revenue Service had complied with all applicable statutes, regulations and rules pertaining to the issuance of a summons, and that the summons was issued in good faith for the proper purpose of conducting an inquiry into the correct tax liabilities of Dykema and the church (Pet. App. D-5, paras. 7 & 8). The magistrate nevertheless concluded that the summons was "overly broad" as a matter of law and recommended that the government's petition be dismissed (Pet. App. D-6).

Upon the application of both parties for de novo review, the district court approved the magistrate's findings that the summons had been issued in good faith for a proper purpose, and rejected petitioners' contentions that enforcement would violate the First Amendment rights of association of the church members (Pet. App. C-3). The court went on to hold, however, that Section 7605(c) imposes a more stringent limitation on the scope of a summons directed to a church than is applicable to summonses generally and that the government is not entitled to examine church records

unless it can demonstrate that the material requested is "truly necessary to enable the IRS to perform its statutory functions" (Pet. App. C-4). The court held that Graner's testimony did not establish that all of the material requested was "truly necessary" to complete the investigation and denied enforcement (*ibid.*).

The court of appeals reversed. It concluded that the "truly necessary" standard of relevance applied by the district court was erroneous, and that the proper test was the "may be relevant" standard approved by this Court in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964) (Pet. App. A-3). After reviewing the legal and factual determinations that the Internal Revenue Service must make in an examination into the operations of an organization claiming tax-exempt status (*id.* at A-3 to A-10), the court ordered the summons enforced, stating (*id.* at A-11):

> In short, detailed examination of the fourteen items embraced in the summons discloses that all of them are appropriate inquiries relevant and necessary to the proper performance of tasks entrusted to the IRS by Congress. There is no good reason shown why the data sought should not be produced.

ARGUMENT

1. Petitioners contend (Pet. 6-8) that the Commissioner must show probable cause to believe that the church under investigation is or was engaged in taxable activities before he may summons church books and records. But Section 7605(c) permits examination of the financial records of a church when a principal IRS officer notifies the organization that he believes it "may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax * * *."

Hence, there is no basis for petitioners' proposed construction (Pet. 7) of Section 7605(c) to require, as a

prerequisite to examination of the church's books and records, that the Commissioner demonstrate, at an adversary hearing, that he has probable cause to believe the Church is engaged in disqualifying or income-producing activities.[1] Such an interpretation would place the Commissioner in the anomalous position of having to prove in substantial measure that the church has a tax liability before he has had an opportunity to examine the material needed to make that determination. Here, there is no support in either the language or the legislative history of Section 7605(c) for petitioners' proposed interpretation, nor is such a requirement necessary to accomplish the objectives of the statute. The notice requirement of Section 7605(c) serves the same function as the analogous notice requirement of Section 7605(b) (which requires advance notice of the necessity of a "second" inspection of a taxpayer's books of account), *viz.*, to insure that an upper echelon official in the Internal Revenue Service, rather than a revenue agent, makes the initial decision, in the exercise of his discretion, that an examination of a church's books and records is required. Indeed, in similar circumstances, this Court has declined to interpret the analogous provisions of Section 7605(b) to require the Commissioner to make a showing of probable cause to suspect the existence of tax

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[1] Petitioners' assertion (Pet. 7) that the Secretary did not give them notification of his belief in the necessity of an examination of the Church's books and records is unfounded. The Regional Commissioner of Internal Revenue, St. Paul, Minnesota, did in fact, by letter dated August 25, 1978 (Exh. 5), advise petitioners that "I believe it is necessary to examine your books of account and other financial information" for the purpose of determining the Church's tax-exempt status, determining whether the Church was eligible to receive tax-deductible contributions, confirming financial transactions relating to other individuals' tax liabilities, and determining the Church's liability for any taxes—such as the unrelated business income tax. He further advised petitioners he believed that examination of their religious activities was necessary to determine their tax-exempt status and eligibility to receive tax-deductible contributions.

fraud as a prerequisite to the examination of the taxpayer's financial records for years as to which the statute of limitations had run. See *United States* v. *Powell*, 379 U.S. 48, 53-54 (1964).

2. Petitioners' conclusory statement (Pet. 10) that "[e]ven if proper, the subpoena is simply overly broad" is amply refuted by the court of appeals' detailed analysis of the government's need for the information requested in light of the legal and factual questions that must be resolved by the investigation (Pet. App. A-3 to A-11).

Moreover, the decision below does not conflict with either *United States* v. *Life Science Church of America*, 636 F. 2d 221 (8th Cir. 1980), or *United States* v. *Holmes*, 614 F. 2d 985 (5th Cir. 1980). In *Holmes*, the court reversed the order of the district court enforcing a summons essentially identical to the summons in this case, ruling that the summons was "too far reaching" (*id.* at 988). In that case, however, the government was not given an opportunity to justify the scope of the summons at an evidentiary hearing, and the court of appeals expressly noted that the trial court had made no finding that the material requested was necessary to enable the Internal Revenue Service to complete the investigation (*ibid.*). Thus, although the court did state that Section 7605(c) restricts the permissible scope of an examination of a church's books and records to some degree, it is unclear what standard of relevance it would apply in church cases, or whether the detailed testimony given by Agent Graner in this case concerning the government's need for the summoned material would have been sufficient to obtain enforcement of the summons in *Holmes*. Similarly, in *Life Science Church*, the court, dealing with a similar summons, found it "likely that the IRS has requested more information than it needs" (636 F. 2d 224). The court nevertheless declined to rule on the matter on the record

presented, remanding the case instead to the district court for further development on the question of overbreadth.[2]

3. Finally, the record does not support petitioners' contention (Pet. 11-13) that the mere examination of the requested information by the Internal Revenue Service would violate the First Amendment rights of association of its members. In issuing the summons in question, the government does not seek to regulate the internal financial affairs of the Church or the religious activities of the Church's members. The summons was issued for the congressionally authorized secular purpose of ascertaining the correct tax liabilities of the Church and Dykema, and does not interfere with the Church members' right to embrace the religious doctrine of their choice. Petitioners have made no meaningful effort to show, as they must, that production of the information requested will significantly hamper their ability to pursue their religious goals. See *Buckley* v. *Valeo*, 424 U.S. 1, 69-72 (1976); *Laird* v. *Tatum*, 408 U.S. 1, 8-16 (1972); *United States* v. *Freedom Church*, 613 F. 2d 316, 320 (1st Cir. 1979); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1210-1211 (D. Nev. 1980). Compare *NAACP* v. *Alabama*, 357 U.S. 449 (1958). The fact that the summoned material might incidentally disclose the names of church members to the Internal Revenue Service is not sufficient to establish a legitimate threat to First Amendment rights. *United States* v. *Freedom Church*, *supra*, 613 F. 2d at 320. See also *United States* v. *Grayson County State Bank*, 656 F. 2d 1070 (5th Cir. 1981), cert. denied, No. 81-954, (Jan. 25, 1982).

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[2]In *United States* v. *Freedom Church*, 613 F. 2d 316, 319-320 (1st Cir. 1979), also cited by petitioners (Pet. 11), the court declined to overturn the district court's determination that the information requested was relevant and material, in light of the total absence of a meaningful effort by the church to support its claim that the summons was overbroad.

At all events, even if enforcement of the summons could be deemed to impose some marginal burden on the First Amendment rights of the Church's members, that small burden is fully justified by the government's compelling need to conduct an effective investigation in aid of enforcement of the revenue laws. *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982); *United States* v. *Grayson County State Bank, supra*, 656 F. 2d at 1074; *United States* v. *Freedom Church, supra*. See *United States* v. *Citizens State Bank*, 612 F. 2d 1091 (8th Cir. 1980).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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